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In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

DARLINA K. FRANCE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether this Court's decision in *Gomez* v. *United States*, 109 S. Ct. 2237 (1989), requires reversal of respondent's convictions even though she did not object to a magistrate's conducting voir dire and even though her attorney expressed no objection to the manner in which the jury was selected.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 886 F.2d 223.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1989, and a petition for rehearing was denied on January 16, 1990. App., *infra*, 15a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

Federal Rule of Criminal Procedure 51 provides:

> Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.

Federal Rule of Criminal Procedure 52(b) provides:

> *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

After a jury trial in the United States District Court for the District of Hawaii, respondent was convicted of assault with a deadly weapon, in violation of 18 U.S.C. 113(c), assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(f), and use of a firearm in relation to a crime of violence, in violation of 18 U.S.C. 924(c). She was sentenced to five years' imprisonment and three years' probation.

1. On December 20, 1986, respondent became upset with her third husband, Neil, when he knocked over a Christmas tree during an argument in their house on a military reservation in Hawaii. Tr. 29, 44, 164-165. Neil left the house and went to a nearby PX. Tr. 48. Later that day, she told a friend that she was angry at her husband and that she would shoot him if she could find a gun. Tr. 165. She

had made similar remarks in the past. Tr. 221. Respondent was drinking beer at home with her friends when Neil returned. Neil was disturbed that respondent was drinking, so he took her beer from the refrigerator and moved it out into the yard. Respondent then chased Neil into the kitchen where they had a loud argument. Tr. 165-168.

After the fight, Neil left the house. Respondent, carrying a gun, then emerged from the house and told Neil that he should leave. Tr. 169-170, 316. Neil, however, started to walk back toward the house. Respondent then shot and seriously wounded Neil. Tr. 196. She walked over to him and said in a normal tone of voice, "I told you I would do it." Tr. 211. When a military policeman arrived on the scene, respondent told him: "He threw the Christmas tree down and that made me mad, but he took my beer and that was the last straw." Tr. 352-353. Respondent admitted at trial that she had also fired a gun at her first husband, and that she had boasted of shooting at her second husband. Tr. 311, 328.

2. Prior to trial, in accordance with what was at that time the regular practice in the District of Hawaii, the district court assigned jury selection to a federal magistrate. Respondent did not object to this assignment, nor did she request that a district judge conduct the voir dire.

During voir dire, the magistrate sustained respondent's only objection to a proposed question submitted by the government. 4/27/87 Tr. 62-63. In addition, the magistrate asked an additional question of the venire at respondent's request. 4/27/87 Tr. 65. At the conclusion of jury selection, the magistrate asked the parties: "For the record, would you like—is there any objection you'd like to make in the manner in which the jury was selected?" 4/27/87 Tr. 71. Respondent's counsel replied: "No, your honor." *Ibid.* When the trial began the next day before a

district judge, respondent did not object to the magistrate's supervision of jury selection or to any of the magistrate's rulings. The jury found petitioner guilty on all three counts described above.[1]

3. In her initial brief on appeal, respondent challenged only her firearms conviction under 18 U.S.C. 924(c). She did not raise any issue concerning the selection of the jury by the magistrate. While the appeal was pending, this Court decided *Gomez* v. *United States*, 109 S. Ct. 2237 (1989). In *Gomez*, the Court held that the Federal Magistrates Act, 28 U.S.C. 631-639, does not authorize district courts to delegate jury selection in felony trials to magistrates, and that the selection of a jury by a magistrate is not harmless error if the defendant made a timely objection. In a motion filed in the court of appeals after the *Gomez* decision, respondent argued for the first time that the district court committed reversible error in delegating jury selection to a magistrate.

The court of appeals reversed respondent's convictions. The court first held (App., *infra*, 7a-8a) that *Gomez* should be applied retroactively to all cases pending on direct appeal at the time it was decided.[2] The court then held that respondent had not waived her right to raise the *Gomez* claim by her failure to object in the district court. The court reasoned that nothing in the *Gomez* opinion suggests that "the Court intended to limit the broad, definitive rule it announced" to cases, like *Gomez*, in which the defendant objected. *Id.* at 9a.

The court of appeals held that, in any event, no objection was necessary to preserve the claimed error because

[1] Count One of the indictment charged respondent with assault with the intent to commit murder. The jury found her guilty of the lesser-included offense of assault with a deadly weapon.

[2] The government does not challenge the court of appeals' ruling on that point. See generally *Griffith* v. *Kentucky*, 479 U.S. 314 (1987).

two prior decisions of the Ninth Circuit had authorized magistrates to conduct voir dire in felony trials.[3] App., *infra*, 9a-10a. Thus, according to the court, respondent faced a "solid wall of circuit authority" that "would have prevented the district court from correcting the alleged error." *Id.* at 10a. In the court's view, to require a defendant to object to "aspects of the trial that have already been approved by the court of appeals" would encourage "defense counsel to burden district courts with repeated assaults on then settled principles out of hope that those principles will be later overturned." *Ibid.* (quoting *Guam* v. *Yang*, 850 F.2d 507, 512 n.8 (9th Cir. 1988) (en banc)).

The Ninth Circuit noted that the "solid wall of circuit authority" exception to the contemporaneous-objection rule had been used only to excuse a defendant's failure to object to a jury instruction. It reasoned, however, that the rule announced in *Gomez* "touches on one of the most 'basic rights' of the accused, the right to a fair and accurate trial." App., *infra*, 10a. Thus, the court concluded that it would be "at best unseemly, and at worst irresponsible, to penalize" respondent for failing to object. *Ibid.*[4]

REASONS FOR GRANTING THE PETITION

In *Gomez* v. *United States*, the defendants objected to the delegation of jury selection to a federal magistrate. The district court overruled that objection, and the Second Circuit affirmed. This Court granted certiorari to decide whether the assignment of jury selection to a magistrate

[3] The two decisions were *United States* v. *Peacock*, 761 F.2d 1313 (9th Cir.), cert. denied, 474 U.S. 847 (1985), and *United States* v. *Bezold*, 760 F.2d 999 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986).

[4] The court of appeals denied the government's petition for rehearing with suggestion for rehearing en banc. App., *infra*, 15a.

"without the defendant's consent" violated the Federal Magistrates Act, 28 U.S.C. 631 *et seq.* See 109 S. Ct. at 2239. The Court held that presiding over jury selection at felony trials is not one of the "additional duties" that may be delegated to magistrates under 28 U.S.C. 636(b)(3). And the Court ruled that such a delegation, over "the defendant's objection," cannot be harmless error. 109 S. Ct. at 2248.

Since *Gomez*, the courts of appeals have struggled with the resolution of direct appeals where the defendant did not object to the magistrate's presiding at voir dire.[5] The questions arising from *Gomez* are especially important to the administration of the federal criminal justice system because, prior to *Gomez*, many district courts frequently delegated jury selection to magistrates. In addition, the circuits have adopted several different approaches to post-*Gomez* appeals. The Second and Seventh Circuits have held that an objection is required to preserve the *Gomez* error for review. The Third Circuit has ruled that no objection is needed to preserve the issue, but that there is no error of law in the delegation of jury selection to a magistrate if the defendant consents. And the Ninth Circuit, in this case, has held that defendants raising a *Gomez* claim are not bound by the general principle that legal issues are forfeited on appeal if not first raised in the district court. We believe that this case is a good vehicle for resolving the important issue whether a defendant's conviction must be reversed under *Gomez* even though he did not object to the magistrate's presiding at voir dire.

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[5] The courts have agreed that the *Gomez* decision applies to all cases that were on direct appeal at the time. App., *infra*, 7a-8a. The government does not dispute that conclusion. See note 2, *supra*. Because this case is on direct review, it does not present the question whether *Gomez* applies as well to collateral attacks on convictions.

1. The issue presented is important to the federal criminal justice system. Prior to *Gomez*, 51 district courts had local rules that provided magistrates with the unqualified authority to conduct voir dire in civil and criminal cases. See U.S. Br. at 22-23 & n.17 in *Gomez*, Nos. 88-5014, 88-5158. Eighteen other districts had rules that allowed magistrates to perform all duties conferred on them by 28 U.S.C. 636, which was often construed to include conducting voir dire. *Gomez* U.S. Br. at 23 & n.19. Undoubtedly, there are many defendants from all over the country who did not object to a magistrate's conducting voir dire and are thus in the same position as respondent.

The Ninth Circuit's decision in this case has particular significance because certain district judges in that circuit routinely referred jury selection to a magistrate. On the basis of its decision in this case, the Ninth Circuit has already reversed the convictions of 15 other defendants. See *United States* v. *Thate*, No. 89-10360 (Oct. 18, 1989); *United States* v. *Nguyen*, No. 89-10235 (Oct. 18, 1989); *United States* v. *Kaleiwahea*, No. 89-10225 (Sept. 29, 1989) (two defendants); *United States* v. *Coppola*, No. 89-10214 (Oct. 18, 1989); *United States* v. *Kaili*, No. 89-10113 (Sept. 13, 1989); *United States* v. *Kuamsiri*, No. 88-1432 (Sept. 13, 1989) (two defendants); *United States* v. *Taylor*, No. 88-1442 (Sept. 29, 1989); *United States* v. *Holland*, No. 88-1253 (Jan. 2, 1990) (three defendants); *United States* v. *Reb'll*, 887 F.2d 1009 (1989); *United States* v. *Nittayanupap*, No. 87-1395 884 F.2d 1318 (1988) (two defendants). The United States Attorney for the District of Hawaii filed in the court of appeals a declaration noting that the District of Hawaii had delegated jury selection to magistrates in "virtually all" criminal cases since the mid-1980s. App., *infra*, 13a. He stated that, if

the Ninth Circuit's decision in this case is not overturned, the convictions of 48 defendants in the District of Hawaii alone "will be reversed and remanded for retrial." *Ibid.*[6] Thus, we believe that the issue presented in this case, which would affect a large number of criminal convictions in the Ninth Circuit and elsewhere, is sufficiently important to warrant plenary review by this Court.

2. a. The court of appeals erred in not holding that respondent forfeited her right to have a district judge preside over the jury selection at her trial. This Court has emphasized that "[n]o procedural principle is more familiar to [the] Court than that a * * * right may be forfeited in criminal as well as civil cases by failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944). Accord *United States* v. *Frady*, 456 U.S. 152, 162 (1982); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940). This rule regarding the forfeiture of legal claims is embodied in Federal Rule of Criminal Procedure 51. That rule abolished the historic use of "exceptions" to preserve legal claims regarding a trial court's orders or actions. But Rule 51 insists that a party make its objections and desires known to the district court. An error is preserved under the rule only if the party "makes known to the court the action which that party desires the court to take or that party's objection to the action of the court."[7]

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[6] We are informed by the Criminal Division of the Department of Justice that judges from several other jurisdictions often delegated voir dire to a magistrate—the District of Puerto Rico, the Eastern District of New York, the Central District of Illinois, the Central District of California, the Eastern District of Michigan, the District of the Virgin Islands, and the District of Delaware.

[7] Rule 51 excuses the lack of an objection if "a party has no opportunity to object to a ruling or order."

This Court, of course, has applied the "raise it or forfeit it" rule in many contexts.[8] For example, in *United States* v. *Gagnon*, 470 U.S. 522 (1985), the district court held a conference in chambers without the presence of the defendants. The defendants did not object, but on appeal argued that the district court had violated their right under Federal Rule of Criminal Procedure 43(a) to be present at all stages of a criminal trial. This Court held that the defendants had forfeited their rights under Rule 43 by failing to object at trial. 470 U.S. at 527-528. Likewise, in *Levine* v. *United States*, 362 U.S. 610 (1960), the Court ruled that the defendant had forfeited any due process right to a public trial by not asking the district judge to open the courtroom. *Id.* at 619. See also *Segurola* v. *United States*, 275 U.S. 106, 111-112 (1927) (Fourth Amendment challenge to the seizure of evidence forfeited in the absence of a timely motion to suppress); 3A C. Wright, *Federal Practice and Procedure* § 842, at 287 (2d ed. 1982) (requirement that defendant object and express his preference applies "to all kinds of rulings at the trial").

The reasons that the defendant must make his views known to the trial court are clear. First, the defendant should not be able to pursue a certain course for tactical reasons and, if convicted, later claim that the course taken by the court was reversible error. See 3 W. LaFave, *Crimi-*

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[8] Strictly speaking, Rule 51 sets forth a rule of forfeiture, not waiver, although the courts often speak in terms of a defendant's "waiver" of a legal claim. See Wangerin, *"Plain Error" and "Fundamental Fairness": Toward a Definition of Exceptions to the Rules of Procedural Default*, 29 De Paul L. Rev. 753, 757-758 (1980). The term "waiver" often connotes the intelligent and knowing relinquishment of a right. The forfeiture principle in Rule 51, by contrast, does not depend on the defendant's state of mind when he failed to raise an issue in the trial court. See *Estelle* v. *Williams*, 425 U.S. 501, 508 & n.3 (1976).

nal Procedure § 26.5, at 251 (1984); see also *Wainwright* v. *Sykes*, 433 U.S. 72, 89 (1977). Second, and perhaps more important, the requirement that the defendant make his views known to the trial court greatly promotes judicial economy. See *United States* v. *Smith*, 490 F.2d 789, 794-795 (D.C. Cir. 1974); *United States* v. *Bamberger*, 456 F.2d 1119, 1131 (3d Cir. 1972), cert. denied, 413 U.S. 919 (1973); 3 W. LaFave, *supra*, at 251. If the issue is raised in the trial court, the trial judge may be able to resolve the matter to the defendant's satisfaction. See *United States* v. *Gagnon*, 470 U.S. at 529. Or the prosecutor might decide to forgo a particular course of conduct in order to eliminate the possibility of inserting a reversible error into the record. See generally *Luce* v. *United States*, 469 U.S. 38, 42 (1984); *Wainwright* v. *Sykes*, 433 U.S. at 89. In either case, a contemporaneous objection would eliminate the need for an appellate reversal and a second trial on the same criminal charges.

In this case, there are two possible arguments to support respondent's claim that she should be exempt from Rule 51. First, the Ninth Circuit believed that she was not required to express her view regarding jury selection because an objection would have been futile in light of Ninth Circuit precedent. Second, respondent has contended that the failure of the district judge to preside at voir dire was "plain error" under Federal Rule of Criminal Procedure 52(b) and thus may be noticed on appeal. Neither argument has merit.

b. The Ninth Circuit held that respondent was not required to express a wish to have a district judge preside at voir dire because, in the court's view, there was a " 'solid wall of circuit authority' which would have prevented the district court from correcting the alleged error." App., *infra*, 10a (quoting *Guam* v. *Yang*, 850 F.2d 507, 512 n.8 (9th Cir. 1988)). There is reason to doubt whether "a solid wall of circuit authority" is ever an exception to the requirement that an issue be raised in the district court. Rule 51 does not expressly set out such an exception. And this Court held in *Engle* v. *Issaac*, 456 U.S. 107 (1982), that contrary and binding state authority was not a sufficient cause for a defendant's failure to present a constitutional objection to a state court. In holding that the failure to object precluded federal habeas review, the Court stated: "[T]he futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial." *Id.* at 130.

Nevertheless, this case does not present the question whether a defendant must make a clearly futile objection to an action of the district court that is mandated by the court of appeals. If there is such an exception, it is surely "very narrow." *Guam* v. *Yang*, 850 F.2d at 512 n.8. The exception would apply only in a case where an objection would be pure ritual—*i.e.*, where the district judge is bound by precedent in his circuit to follow a prescribed course of action. In such a case, none of the reasons underlying Rule 51 would apply because the defendant would not be in a position to make a tactical choice (there would be only one available option) and the trial court would not be free to correct any error (it would be bound by higher precedent). Thus, the courts of appeals that have excused the failure to object on the ground of a "solid wall of circuit authority" have done so in cases in which the trial court's action was compelled. See, *e.g.*, *United States* v. *Liquori*, 438 F.2d 663, 665 (2d Cir. 1971); *Martone* v. *United States*, 435 F.2d 609, 610-611 (1st Cir. 1970).[9]

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[9] The Ninth Circuit itself recognized as much in *Guam* v. *Yang*, *supra*, when it stated that this "narrow exception only applies * * *

In this case, however, the district court's action was not mandated by binding circuit precedent. In *United States* v. *Peacock*, 761 F.2d 1313 (9th Cir.), cert. denied, 474 U.S. 847 (1985), and *United States* v. *Bezold*, 760 F.2d 999 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986), the Ninth Circuit held that the Federal Magistrates Act vested district courts with discretion to delegate jury selection to magistrates. Nothing in those decisions hinted that district judges were required to—or even should—make such a delegation. Thus, there plainly was not a "solid wall of circuit authority" preventing the district court from conducting jury selection at respondent's trial. Indeed, prior to *Gomez* there were examples where a district judge in Hawaii would grant a defendant's request that the judge conduct voir dire. See 87-1282 Gov't C.A. Supp. Br. at 6 (referring to *United States* v. *Rewald*, Cr. 84-02417 (D. Haw.).[10] Accordingly, Rule 51 required respondent to "make[] known to the court the action" that she desired in order to preserve for appellate review her claim that the district judge should have presided over jury selection.

The rationale underlying the rule requiring a litigant to make her preferences known to the trial court is fully applicable in this case. For tactical reasons, a defendant might prefer that a magistrate conduct voir dire. There may be cases in which defense counsel believes that the magistrate would be more willing than a district judge to allow counsel to question prospective jurors. Or a particu-

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when a wall of binding authority squarely precludes the trial court from correcting an error." 850 F.2d at 512 n.8.

[10] There are similar examples from other districts in which magistrates ordinarily conducted voir dire. The panel in *United States* v. *Lopez-Pena*, 891 F.2d 490 (1st Cir. 1989), reh'g granted (Feb. 9, 1990), described such a case in the District of Rhode Island.

lar defense lawyer might believe that the magistrate's view of qualified jurors is more favorable to the defendant than the district judge's view. In this very case, there are reasons to believe that the defendant was quite happy to have the magistrate preside at voir dire. The magistrate sustained defense counsel's objection to a question proposed by the government, and the magistrate asked an additional question of the venire at respondent's request. Hence, respondent should not be able to remain silent, proceed with jury selection before a magistrate who rules in her favor twice, and later claim that the district court erred in not conducting voir dire itself.

In sum, if respondent had wanted the district court to conduct voir dire, she should have said so. Because she did not, this case is exactly like many other cases in which the defendant's silence meant that he forfeited the right on appeal to claim that the district court erred in adopting a particular discretionary choice. See, *e.g.*, *United States* v. *Kirkland*, 637 F.2d 654 (9th Cir. 1980) (defendant could not question joinder where he did not move for severance); *United States* v. *Brown*, 493 F.2d 485 (5th Cir.) (defendant did not object to dispersal of jury after final argument), cert. denied, 419 U.S. 865 (1974); *United States* v. *Woodner*, 317 F.2d 649 (2d Cir.) (defendant failed to object to manner in which jurors' hardship excuses were granted), cert. denied, 375 U.S. 903 (1963).

c. Federal Rule of Criminal Procedure 52(b) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the [district] court." Respondent has contended that the delegation of jury selection to a magistrate is such a "plain error."[11] That contention is also without merit.

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[11] The court of appeals did not expressly rest its judgment on that ground, but did state that the *Gomez* Court apparently did not intend

In *United States* v. *Frady*, 456 U.S. 152 (1982), the Court held that Rule 52(b) is a narrow exception to the contemporaneous-objection rule—one that "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *Id.* at 163 n.14. The plain error rule should be used "to correct 'only particularly egregious errors,' those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' " *United States* v. *Young*, 470 U.S. 1, 15 (1985) (citations omitted). This stringent test for "plain error" applies equally to all errors—whether founded upon the Constitution, a statute, or rule. See, *e.g.*, *id.* at 16-17 & n.13; *Levine* v. *United States*, 362 U.S. 610, 619 (1960).

The courts have consistently held that defendants have forfeited important statutory and constitutional rights in cases in which there was no miscarriage of justice. See, *e.g.*, *United States* v. *Figueroa*, 818 F.2d 1020, 1025 (1st Cir. 1987) (defendant forfeited claim that he was not brought before magistrate without unnecessary delay); *United States* v. *Bayko*, 774 F.2d 516, 517-518 (1st Cir. 1985) (forfeited *ex post facto* argument); *United States* v. *Bascaro*, 742 F.2d 1335, 1365 (11th Cir. 1984) (forfeited double jeopardy defense), cert. denied, 472 U.S. 1017 (1985); *United States* v. *Coleman*, 707 F.2d 374, 376 (9th Cir.) (forfeited Fifth Amendment claim), cert. denied, 464 U.S. 854 (1983); *United States* v. *Surridge*, 687 F.2d 250, 255 (8th Cir.) (forfeited Fourth Amendment objection), cert. denied, 459 U.S. 1044 (1982).[12]

"to limit the broad, definitive rule it announced to" a case where the defendant objected to the magistrate's conducting voir dire. App., *infra*, 9a.

[12] In *Gomez*, the Court held that the error of delegating jury selection to a magistrate over the defendant's objection could not be "harmless error." 109 S. Ct. at 2248. But it is well settled that the plain error standard is a much more stringent test for a defendant to satisfy. See *United States* v. *Thame*, 846 F.2d 200 (3d Cir.), cert. denied, 109 S. Ct. 314 (1988); *United States* v. *Silverstein*, 732 F.2d 1338, 1349 (7th Cir. 1984), cert. denied, 469 U.S. 1111 (1985); *United States* v. *Blackwell*, 694 F.2d 1325, 1341 (D.C. Cir. 1982). This is true because there may be cases where it is impossible to say that an error was harmless beyond a reasonable doubt but where it is clear that there was no miscarriage of justice. See *United States* v. *Thame*, 846 F.2d at 207 ("Although we do not believe that the error was sufficiently minor to be harmless beyond a reasonable doubt, we also do not believe that it was sufficiently major that a miscarriage of justice will result if the conviction is not reversed."). The difference in the two standards reflects the fundamental premise of our adversarial system that litigants must make their views known to the trial court.

Judged by the high "miscarriage of justice" standard, the district court's delegation of jury selection to a federal magistrate was not plain error in this case. Magistrates in the District of Hawaii had gained substantial experience over the years in presiding at voir dire. The record in this case shows that the magistrate gave routine instructions to the prospective jurors and asked typical questions of the venire. The magistrate gave the parties the number of peremptory challenges allowed under Federal Rule of Criminal Procedure 24. See 4/27/87 Tr. 2. The record also shows that the magistrate sustained respondent's only objection during voir dire, and he asked a question requested by respondent. Respondent's counsel stated that he was satisfied with the manner in which the jury was selected. 4/27/87 Tr. 71. The balance of petitioner's trial was conducted before the district judge, and the evidence of petitioner's guilt was overwhelming. Accordingly, the jury's guilty verdicts did not result in a miscarriage of justice that may be corrected under Rule 52(b). See *United States* v. *Wey*, No. 89-2106 (7th Cir. Feb. 15, 1990) (jury selection by magistrate was not plain error); *United States* v. *DeFiore*, 720 F.2d 757 (2d Cir. 1983) (same), cert. denied,

466 U.S. 906 (1984); *United States* v. *Rivera-Sola*, 713 F.2d 866 (1st Cir. 1983) (same).

3. The courts of appeals have taken divergent approaches to cases in which the defendant did not object to a magistrate's presiding at voir dire. As we have described, the Ninth Circuit in this case held that no objection was necessary to raise the *Gomez* claim on appeal. The Second Circuit, by contrast, has ruled that it will not reverse convictions where the defendant did not object to the magistrate's role. In *United States* v. *Mang Sun Wong*, 884 F.2d 1537 (1989), cert. denied, No. 89-5949 (Feb. 20, 1990), the Second Circuit refused to reverse a defendant's conviction where he had given his "explicit consent" to "the magistrate's selection of a jury." *Id.* at 1546.[13] In *United States* v. *Vanwort*, 887 F.2d 375 (1989), petitions for cert. pending, Nos. 89-1084, 89-6313, the Second Circuit, without expressly discussing the plain error doctrine, extended its decision in *Mang Sun Wong* to a case in which the defendants simply failed to object. The Seventh Circuit recently agreed that it was not "plain error" for a court to delegate jury selection to a magistrate in a case where the defendant did not object. See *United States* v. *Wey*, No. 89-2106 (Feb. 15, 1990).[14]

The Third Circuit has taken a different approach but ultimately reached the same result as the Second and Seventh Circuits. In *Government of the Virgin Islands* v.

[13] Judge Altimari dissented because he believed that "a magistrate has no power to seat a jury in a felony case with or without the defendant's consent." 884 F.2d at 1546.

[14] A panel of the First Circuit in *United States* v. *Lopez-Pena*, 890 F.2d 490 (1989), held that the delegation of jury selection to a magistrate was not a plain error that required reversal in the absence of an objection. Judge Aldrich dissented. On February 9, 1990, the First Circuit vacated the panel decision and set the case for reargument before the entire court.

Williams, 892 F.2d 305 (1989), the Third Circuit first ruled that the defendant was not barred by the contemporaneous objection rule from raising a *Gomez* issue on appeal. The court reasoned that such an issue is in the nature of a "jurisdictional objection" that may be raised at any time. *Id.* at 310. Nevertheless, the Third Circuit concluded that there was no error in that case because the Federal Magistrates Act permits a magistrate to conduct voir dire if the defendant consents. *Id.* at 310-311.[15]

We believe that this case presents a suitable vehicle for resolving two of the most important post-*Gomez* issues—whether a defendant's lack of objection should be excused on the ground of futility, and whether the delegation of jury selection to a magistrate before *Gomez* was "plain error" under Rule 52(b). The "futility" issue is not squarely presented by a case from any other circuit, but it is important because it affects so many convictions in the Ninth Circuit—in particular, almost every conviction in the District of Hawaii. And the plain error question has widespread significance to many appellants throughout the circuits who have raised a *Gomez* issue even though they did not object at trial.

[15] Judge Mansmann concurred only in the judgment. She reasoned that the district court erred in delegating jury selection to a magistrate, but that there was no plain error requiring reversal in the absence of an objection.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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FEBRUARY 1990

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-1282
D.C. No. 87-00079 RJK

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DARLINA K. FRANCE, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Hawaii
Robert J. Kelleher, District Judge, Presiding

Argued November 10, 1988—Honolulu, Hawaii
Submitted July 7, 1989

[Filed Sept. 13, 1989]

Before: Dorothy W. Nelson, Stephen Reinhardt and Charles Wiggins, Circuit Judges.

Opinion by Judge Reinhardt

OPINION

REINHARDT, Circuit Judge:

Darlina France shot her husband after an argument. The event appears to have been merely the most violent moment in a relationship that had for some time been less than idyllic. Since the shooting occurred on the military base where the couple lived, it fell within the "special territorial jurisdiction" of the United States, *see* U.S.C. § 113, and made France liable for a federal offense. The Government charged her with assault with intent to murder, assault resulting in serious bodily injury, 18 U.S.C. § 113 (a), (f), and using a firearm in the commission of a felony, 18 U.S.C. § 924(c). She was found guilty on two assault-related charges and on the weapons count. The conviction under § 924(c) carried with it a five-year mandatory prison term, without the possibility of probation or parole.

Because of the circumstances surrounding the offense, events in the district court, and concerns about the constitutionality of § 924(c) as applied to France, we ordered supplemental briefing in this case after argument. In the interim, the Supreme Court decided *Gomez v. United States*, ____ U.S. ____ 109 S. Ct. 2237 (1989), holding that it is reversible error for federal magistrates to conduct jury selection in felony trials. A magistrate conducted the voir dire in France's trial. We conclude that France's case falls within the *Gomez* rule, and we reverse her conviction. We address the broader concerns which we have had about this case only in passing at the end of our discussion.

I

The Government and France offer starkly disparate pictures of the events which led up to the shooting. The Government emphasizes that France had apparently been

involved in violent incidents with her two previous husbands and that she was angered when, the day before the shooting, her husband had knocked over their Christmas tree and, on the day of the shooting, had taken a beer from her. At trial, France described the situation somewhat differently. She recounted a history of physical abuse at the hands of a previous husband and described how, in the midst of an argument and just prior to the shooting, her current husband had attacked her.

The parties stress different facts concerning the actual shooting as well. The Government makes much of the fact that Mr. France was about 20 feet from his wife when he was shot, while France highlights the fact that her husband had turned around and was beginning to walk toward her once more when she fired. Whatever the case, France shot her husband in the shoulder with a gun he had bought for her some months before. She then went to her husband and told one of her two daughters to call an ambulance. At this point, France appears to have made several contradictory statements, repeating to law enforcement officers that she had not meant to shoot her husband, while also stating that "he [her husband] took my beer and that was the last straw."

At trial, Mr. France testified that he believed the shooting to have been accidental, given the gun's light trigger pull. He also testified that he and his wife had reconciled, that they loved each other and that he had asked that she not be prosecuted. The Government refused to accede to this request and chose to prosecute France under § 924(c), which carries a mandatory five-year prison sentence without possibility of probation or parole, as well on the two felony assault counts. Jury selection was conducted by a federal magistrate, without objection from France. The jury convicted France of assault with a deadly weapon, a lesser included offense of assault with intent to

to commit murder under 18 U.S.C. § 113(a), assault resulting in serious bodily injury under 18 U.S.C. § 113(f), and using a firearm in relation to a crime of violence under 18 U.S.C. § 924(c).

Then followed a most enlightening sentencing hearing. Judge Kelleher, expressing understandable hostility to his obligation to impose a five-year, no-probation, no-parole sentence on France, criticized the statute's relegation of the sentencing judge to an individual who gives only a "*pro forma* performance." He continued by stating that he "might as well go fishing on the day of the sentence and ask the clerk to pronounce sentence." He explicitly told France that he felt her case did not warrant a sentence of five years in prison without the possibility of parole. He then imposed the sentence required by § 924(c), sentencing France to concurrent three-year terms of probation for her two convictions under § 113.

France appealed. We ordered supplemental briefing on issues concerning the constitutionality of § 924(c), and allowed the National Association of Criminal Defense Lawyers to file an *amicus curiae* brief on France's behalf. Meanwhile, the Supreme Court decided *Gomez*. We then granted the motion of France's attorney, a public defender, to file a supplemental brief concerning *Gomez*, and ordered the government to respond. As we conclude that the decision in *Gomez* requires us to reverse France's conviction, we do not reach the constitutional issues ably briefed by the parties.

II

A. *Gomez*

In *Gomez*, the Supreme Court examined whether a provision of the Federal Magistrates Act ("Act") which allows magistrates to perform "such additional duties as are not inconsistent with the Constitution and laws of the United

States," 28 U.S.C. § 636(b)(3), empowers magistrates to conduct jury selection in felony trials. 109 S. Ct. at 2239. The Court noted that Gomez and the other petitioners had initially objected to having a magistrate conduct voir dire and jury selection, but had never demonstrated or claimed that they were prejudiced by the magistrate's action. *Id.* After examining the structure and history of the Act, the *Gomez* court concluded that jury selection was not within the " 'range of duties' that Congress intended magistrates to perform." *Id.* at 2242 (quoting *Mathews v. Weber*, 423 U.S. 261, 270 (1976)).

The Court emphasized three factors in reaching its result. First, it noted that Congress had specifically authorized magistrates "to conduct trials of civil matters and of minor criminal cases" and determined that this "carefully defined grant of authority" should be construed as an implicit withholding of the authority to preside at a felony trial." 109 S. Ct. at 2245. Second, it examined in detail the role that jury selection occupies in a criminal trial, observing that it represented a "critical stage of the criminal proceeding," with voir dire the "primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice." *Id.* at 2246 (citing *Lewis v. United States*, 146 U.S. 370, 374 (1892), and *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981)). Finally, the Court discussed the degree to which the individual who conducts voir dire must make sensitive evaluations of "not only spoken words but also [the] gestures and attitudes of all participants to ensure the jury's impartiality," and expressed "serious doubts that a district judge could review the[ese] function[s] meaningfully." 109 S. Ct. at 2247. Based on these observations, the court concluded that Congress had not given magistrates the power to conduct jury selection in a felony trial.

The Court, in the final portion of its opinion, stated clearly that "a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside," *id.* at 2248, placed the error in *Gomez* in the category of errors that "'"can never be treated as harmless,"'" *Id.* (quoting *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967))). It thus ended its opinion by ruling that *Gomez* error was not susceptible to harmless error analysis. 109 S. Ct. at 2248.

Having described the rationale and holding of *Gomez*, we turn now to the task of applying it to France's case.

B. Application of *Gomez*

When we ordered the government to respond to the *Gomez* brief filed by France's public defender, we specifically mandated that the government address issues of retroactivity and waiver.[1] We have reviewed the government's arguments and conclude (1) that *Gomez* must be

[1] The government in its brief advanced the view that the fact that district judges in Hawaii are "readily available" to review the behavior of magistrates during voir dire distinguishes France's case from the situation in *Gomez*. We reject this argument on two grounds. First, the Supreme Court's careful description of the role of the judge in conducting voir dire, *supra*, does not invite the sort of distinction between "ready" and "less than ready" availability that the government seeks to draw. Either the judge is there conducting voir dire or he is not; if he is not there—no matter how close to the courtroom he may be or how soon he is consulted—the potential for "meaningful review" has been lost. *See Gomez*, 109 S. Ct. at 2247. Second, the Supreme Court explicitly ruled that magistrates lack the *power* to conduct voir dire in a felony trial. Thus, in every case in which a magistrate conducts voir dire the defendant is deprived of (in this case) her "basic" rights "to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside." *Id.* at 2248.

applied (at least) to all convictions not yet final, and (2) that the fact that France did not object to the magistrate conducting jury selection does not serve to waive her right to a reversal under *Gomez*.

(1)

The Supreme Court has made clear that "as a rule, judicial decisions apply 'retroactively,'" *Solem v. Stumes*, 465 U.S. 638, 642 (1984) ("*Stumes*") (quoting and citing *Robinson v. Neil*, 409 U.S. 505, 507-508 (1973)). Retroactivity is "most appropriate" in those cases where a new rule "is designed to enhance the accuracy of criminal trial." *Stumes*, 465 U.S. at 643 (new constitutional rule); *see also Williams v. United States*, 401 U.S. 646, 653 & n.6 (1971) (plurality opinion). Although the Court has usually discussed retroactivity in the context of new constitutional rules, we believe that the analysis of *Stumes* and *Williams* applies to *Gomez* as well. The Supreme Court, although its decision was, in the end, one of statutory construction, made clear that its holding was compelled by the notion that any other result might well run afoul of the Constitution by authorizing the deprivation of one of the "basic rights" of a criminal defendant. *See Gomez*, 109 S. Ct. at 2241, 2246-48. Moreover, the *Gomez* court's explicit discussion of the potential for incurable error in jury selection should magistrates select a jury in a felony trial over which a district judge would ultimately preside, *id.* at 2247, demonstrates that its decision was grounded in notions of trial "accuracy" making the *Gomez* rule precisely the sort of holding "most appropriate" for retroactive application. *Stumes*, 465 U.S. at 643.

Finally, we note that the question resolved in *Gomez* had never previously been addressed by the Supreme Court. Indeed, the Court explicitly noted the conflict among the courts of appeals on the question, citing two of

our own cases (which it ultimately overruled, *infra*) as examples of the view it rejected. 109 S. Ct. at 2240 & n.7. The *Gomez* result thus represents a newly announced rule concerning the conduct of felony trials. As such, it is a rule which must be applied retroactively. In the words of the Supreme Court in *Griffith v. Kentucky*, ____ U.S. ____, 107 S. Ct. 708, 716 (1987) ("*Griffith*"):

> [A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final, with no exception for cases in which the rule constitutes a "clear break" with the past.

Accordingly, we conclude that the rule announced in *Gomez v. United States* must be applied "to all cases pending on direct review or not yet final" on July 7, 1989, the date on which the mandate in *Gomez* issued. "Final" in this context refers to "a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith*, 107 S. Ct. 712 n.6.[2]

We next turn to the question whether France waived her right to reversal under *Gomez* by not raising an objection to having the magistrate select the jury for her trial. The government relies on two aspects of *Gomez* to support the view that we should find waiver here. It first notes that the Court stated (in its recitation of the facts) that the petitioners in *Gomez* did object when magistrates selected their juries. 109 S. Ct. at 2239. Second, the government quotes a snippet of the concluding sentence in *Gomez*

[2] As we are not called upon to decide it in this case, we leave open the question whether the *Gomez* decision should be afforded "complete" retroactive effect and applied to convictions pending on collateral review. *See Teague v. Lane*, __ U.S. __, 109 S. Ct. 1060 (1989).

where the Court stated that harmless error analysis would not apply in a case "in which, despite the defendant's objection . . . [a magistrate] exceeds his jurisdiction by selecting a jury." *Id.* at 2248. The government suggests that these observations are sufficient to demonstrate that contemporaneous objection is required to preserve one's right to challenge the magistrate's conduct of voir dire at some later point. We do not find the government's argument persuasive.

Looking first to the *Gomez* decision itself, we find absolutely no indication in the tenor or the text of the opinion to suggest that the Court relied on, or did more than note—in the interest of providing a full and accurate description of the facts before it—the fact the petitioners had objected to the magistrate's conducting voir dire. The snippet recited above merely recapitulates the facts of the case as a descriptive matter. We do not think that the passage can reasonably be read to suggest that the Court intended to limit the broad, definitive rule it announced to the precise facts before it.

We have a far more tangible reason for our holding, however. As the *Gomez* court itself noted, our court had previously ruled in two cases that it was not error for magistrates to conduct voir dire in felony trials. 109 S. Ct. 2240 n.7 (citing *United States v. Peacock*, 761 F.2d 1313 (9th Cir.), *cert. denied*, 474 U.S. 847 (1985); *United States v. Bezold*, 760 F.2d 999 (9th Cir. 1985), *cert. denied*, 474 U.S. 1063 (1986)). Thus the uniform, settled rule applicable to France at the time of her trial was that the magistrate was empowered to select her jury. As *Gomez* now informs us, our view was erroneous. The only question, therefore, is whether France should be penalized for abiding by the controlling law at the time.

We have held in two decisions *en banc* that a party does not waive its right to challenge a jury instruction if it fails

to register a contemporaneous objection—even when contemporaneous objection is required by procedural rule—if there is a "solid wall of circuit authority" which would have prevented the district court from correcting the alleged error. *Guam v. Yang*, 850 F.2d 507 n.8 (9th Cir. 1988) (en banc) ("*Yang II*"); *United States v. Scott*, 425 F.2d 55, 57-58 (9th Cir. 1970) (en banc) (Fed. R. Crim. P. 30) ("*Scott*"). The justifications for this rule are simple. Objecting in the trial court to a clearly defined rule of the circuit is futile, inasmuch as the trial court cannot overrule authority binding on it. Furthermore, requiring parties to object to aspects of the trial that have already been approved by the court of appeals would work the " 'unhappy result' " of " 'encourag[ing] defense counsel to burden district courts with repeated assaults on then settled principles out of hope that those principles will be later overturned.' " *Yang I*, 850 F.2d at 512 n.8 (quoting *Scott*, 425 F.2d at 57-58).

Even though the issue before us does not involve a failure to object to a jury instruction, we believe, contrary to the government's argument, that the rule of *Yang II* and *Scott* is not limited to the narrow facts of those cases and is applicable to France's case. We note first that the justifications for the rule in our earlier *en banc* cases apply with at least equal force here. Second, and equally important, the rule announced in *Gomez* is one that touches on one of the most "basic rights" of the accused, the right to a fair and accurate trial. As we implied when we framed the question, *supra* at 11, it seems to us at best unseemly, and at worst irresponsible, to penalize France for following the law as it existed at the time her jury was selected. Finally, it is incongruous to hold that a rule that is "designed to enhance the accuracy of a criminal trial," *Stumes*, 465 U.S. at 643, and which must, therefore, be given broad retroactive application, can be waived because a defendant did

not guess that the law would change some time after the error was committed.

We conclude in this case that France was presented with a "solid wall of circuit authority" and that an exception similar to that recognized in *Yang II* and *Scott* is applicable. *Peacock* and *Bezold* had already decided, erroneously, that magistrates could conduct voir dire in felony trials. Any objection to the magistrate performing voir dire in France's case would, therefore, clearly have been futile. We therefore hold that France did not waive her right to object, once the Supreme Court's decision in *Gomez* had been rendered, to having a magistrate select her jury.

III

Since we have concluded that the *per se* rule of reversal announced in *Gomez* applies to all cases not final when *Gomez* was decided and that France has not waived her ability to avail herself of that rule, we reverse her conviction. We offer only two final observations. The first concerns the government's decision to prosecute France under § 924(c). While we understand that courts must give the Executive extremely wide latitude in choosing the statutes under which it seeks to indict and prosecute offenders, we, as the district judge apparently was, have been left with the sense that Darlina France may not be the sort of hardened, violent offender whom Congress had in mind when it enacted the Comprehensive Crime Control Act of 1984, of which § 924 was a part. *See* S. Rep. No. 98-225, 98th Cong., 2d Sess. 312-13, *reprinted in* 1984 U.S. Code. Cong. & Admin. News, 3182, 3490-91. We doubt that the purposes of punishment, even society's interest in retribution against those who violate its norms, are well served by imprisoning France for five years, separating her from her daughters and the husband, her "victim," with whom she

has apparently reconciled. *See* W. Shakespeare, *Merchant of Venice*, Act IV, scene 1, at 184 *et seq*.

Finally, we add a word about the public defender who represented France. Throughout these lengthy proceedings, he has represented his client with vigor and diligence. His supplemental brief on the constitutionality of § 924 was both a substantial and an impressive undertaking although, ironically, it turned out to be irrelevant to our disposition of the case. His *Gomez* brief, which appeared only a few weeks after the decision was handed down, was equally impressive, and was dispositive. In an era when the offices of federal public defenders will likely bear both a greater share of the burden of defending federal defendants and a greater responsibility for securing the rights of the accused, *see Caplin & Drysdale, Chartered v. United States*, __ U.S. __, 109 S. Ct. 2667, 2677 (1989) (dissenting opinion), it seems appropriate to commend exceptional effort in an unusual case. This case was unusual and the public defender's efforts were exceptional. The conviction is

REVERSED

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 87-1282
Cr. No. 87-00079 RJK
(USDC – Hawaii)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

DARLINA K. FRANCE, DEFENDANT-APPELLEE

[Excecuted Oct. 20, 1989]

DECLARATION OF DANIEL BENT

I, DANIEL BENT, declare and say:

1. I am the United States Attorney for the District of Hawaii and have been since 1982.

2. Since approximately the mid-1980's the United States District Court for the District of Hawaii has had magistrates presides over virtually all jury selection proceedings.

3. I have read this Court's decision in this case and believe that if it remains as controlling precedent in its present form, there will be approximately twenty-seven (27) cases involving approximately forty-eight (48) defendants that will be reversed and remanded for retrial.

4. The total amount of time consumed in these trials has been estimated to be approximately seventy-three (73) attorney work-weeks, which does not include any preparation time and which includes one day per week when the District Court normally does not hold trial.

5. The impact of the application of this Court's present decision in this matter will thus have a severe impact on the administration of justice in the District of Hawaii both in terms of personnel and cost, even if it is assumed that not all of the cases will actually be retried due to plea agreements, or other circumstances that one could reasonably expect to interfere with the retrial of cases that have been pending appeal for up to two years.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 20th, 1989, at Honolulu, Hawaii.

/s/ Daniel Bent
DANIEL BENT

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-1282
D.C. No. 87-00079 RJK

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DARLINA K. FRANCE, DEFENDANT-APPELLANT

[Filed Jan. 16, 1990]

Appeal from the United States District Court
for the District of Hawaii
Robert J. Kelleher, District Judge, Presiding

Before: Nelson, Reinhardt, and Wiggins, Circuit Judges.

ORDER

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/00776